84-1055

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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EDWARD R. DRURY,
Petitioner

VERSUS

THE LOUISIANA STATE BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

EDWARD R. DRURY, PRO SE
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QUESTION PRESENTED

1. The Constitutionality of the Article XV Section 8 of the Louisiana State Bar Association's Articles of Incorporation LSA--R.S. 37:4 on its face and as it is factually applied in that it allows the Louisiana Supreme Court to use as a basis for disciplining an attorney licensed to practice in the State an incidential finding by a trial judge in a criminal proceeding against the attorney. Notwithstanding the fact that the incidential finding was never charged in the indictment against the defendant attorney, nor was he ever granted the opportunity to know the charge for which he is being disciplined and pursuant to the Rules of Procedure as layed down by Article XV Section 8(7)(d) of the Articles of Incorporation of the Louisiana State

Bar Association LSA--R.S. 37:4, the attorney was estopped from presenting any evidence which would demonstrate his innocents.

PARTIES TO THE PROCEEDING

Petitioner:

Edward R. Drury

Respondent:

Louisiana State Bar Association

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IN THE
SUPREME COURT OF THE UNITED STATES

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EDWARD R. DRURY,
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VERSUS

THE LOUISIANA STATE BAR ASSOCIATION
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

Petitioner, Edward R. Drury, prays that a writ of certiorari issue to review the judgment and opinion of the Louisiana Supreme Court.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court suspending your petitioner from practice for a period of three years is unreported at this time. It appears in Appendix "E" to this petition.

Denial of application for rehearing unreported at this date appears in Appendix "F".

STATEMENT OF JURISDICTION

The judgment of the Louisiana Supreme Court was entered on September 10, 1984 and a timely filed petition for rehearing was denied on October 4, 1984. This petition is filed within 90 days thereof.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. CONSTITUTION OF THE UNITED STATES

AMENDMENT (V).

Capital crimes; double jeopardy self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (VI).

Jury Trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT (XIV).

Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

2. ARTICLES OF INCORPORATION OF THE LOUISIANA STATE BAR ASSOCATION.

ARTICLE XV SECTION 8
CONVICTION OF A CRIME

See Appendix "G"

LSA--R.S. 37:4

ARTICLE XVI CANNON 5
DISCIPLINARY RULES
D.R.5-107

AVOIDING INFLUENCE BY OTHERS THAN THE CLIENTS

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.

LSA--R.S. 37:4

STATEMENT OF THE CASE

A. Facts.

Petitioner, a licensed attorney in the State of Louisiana was indicted on July 10, 1981 for twenty counts of mail fraud and one count of conspiracy. The indictment charged that the petitioner had caused insurance companies to pay inflated prices based on false medical

statements and also to cause clients to pay expenses in excess of that which were incurred.[1]

After a trial before a federal district judge sitting in the Eastern District of Louisiana without a jury, your petitioner was acquitted of conspiracy and any fraud against insurance companies and was convicted of twenty counts of mail fraud with reference to the clients only. Reasons for conviction were issued and made part of the record.[2] An appeal was taken to the United States Fifth Circuit Court of Appeals which appeal affirmed the findings of the District Court. United States v. Edward R. Drury, 687 F.2d 63 (5th Cir. 1982).

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1. See indictment at appendix "A"

2. See Minute Entry at appendix "B"

An application for writ of certiorari was made to this Court on April 29, 1983. Edward R. Drury v. United States of America, 82-1395. The petition was denied on May 23, 1983. An application for rehearing was denied on August 23, 1983. Edward R. Drury v. United States of America, 82-1395.

B. Proceedings Instituted by the Louisiana State Bar Association

On March 15, 1983 the Louisiana State Bar Association through its Committee on Professional Responsibility filed with the Louisiana Supreme Court a petition for disciplinary action pursuant to Article XV Section 8 of the Articles of Incorporation of the Louisiana State Bar Association.[3,4]

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3. See Article XV Section 8 Louisiana State Bar Association Articles of Incorporation at appendix "G".

4. See Petition for Disciplinary Action at appendix "H".

R.S. 37:4 Article XV Section 8, Conviction of a Crime. Your petitioner answered said petition.[5] A commissioner was appointed to take evidence and make findings of fact and conclusions of law, and file same with the Louisiana Supreme Court.[6]

The commissioner's hearing was held on October 11, 1983 and your petitioner participated in said hearing and gave testimony. The Rules of Procedure as outlined in Article XV Section 8(7)(d) of the Louisiana State Bar Association's Articles of Incorporation states:

> "At the hearing a respondent may offer evidence only of mitigating circumstances not inconsistent with the essential ele-

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5. See answer at appendix "I".

6. See Commissioner's Findings of Fact at appendix "D".

> ments of the crime for which he was convicted and determined by the statute defining the crime."

On September 10, 1984 the Louisiana Supreme Court rendered judgment against your petitioner and suspended him from the practice of law for a period of three years.[7]

The judgment of the court was predicated solely on the violation of disciplinary rule 5-107, R.S. 37:4, Article XVI, Cannon 5, D.R. 5-107. Which disciplinary rule was not included in the original indictment. Therefore, no defense was offered in support of your petitioner's contention that he had not violated disciplinary rule 5-107. The very first time that the disciplinary rule was ever

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7. See the Judgment of the Louisiana Supreme Court at appendix "E".

mentioned is in the special findings of the federal district judge in the original criminal proceedings.

Furthermore, the commissioner's findings of fact which were filed with the Louisiana Supreme Court on January 31, 1984 make no reference to the violation of disciplinary rule 5-107.

REASONS FOR GRANTING THE WRIT

POINT I.

The Articles of Incorporation of the Louisiana State Bar Association, more particularly Article XV Section 8 is unconstitutional on its face and as it is factually applied, in that, it denies a respondent lawyer in a disciplinary proceeding the right guaranteed him under the Sixth Amendment to the United States Constitution and made applicable to the individual States through the Fourteenth Amendment.

The United States Constitution

Amendment VI states in part:

> "And to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The judgment of the Louisiana Supreme Court which resulted in your petitioner's suspension from practice was predicated solely on the violation of disciplinary rule 5-107. LSA-R.S. 37:4, Art. XVI, Cannon 5, D.R. 5-107. The proceedings against your petitioner were instituted under Article XV Section 8 of the Louisiana State Bar Association Articles of Incorporation. LSA--R.S. 37:4, Art. XV, Section 8. Which deals with "Conviction of a Crime". The only crime your petitioner was found guilty of in the Federal District Court was mail fraud.

What the Louisiana Supreme Court has done is to take an incidential finding by a federal district judge and use that finding as the sole basis to suspend your petitioner from practice, while at the same time ignoring the crime for which he was convicted as determined by the statute defining the crime.

This action by the Louisiana Supreme Court is a denial of your petitioner's Sixth Amendment right:

> "To be informed of the nature and cause of the accusation." Constitution of the United States, Amendment VI.

The Articles of Incorporation of the Louisiana State Bar Association go on to state that the petitioner cannot offer evidence which is inconsistent with the essential elements

of the crime for which he was convicted as determined by the statute defining the crime. Article XV Section 8(7)(d), id. The Louisiana Supreme Court has totally ignored the statute defining the crime for which your petitioner was convicted--mail fraud--and predicated his suspension solely on an incidential finding by the United States District Judge who convicted your petitioner. Again, the original indictment in the criminal proceeding made no mention whatever of the violation of a disciplinary rule.[8] This action by the Louisiana Supreme Court denied your petitioner his due process rights which are guaranteed him in the Constitution of the United States, Amendment V, VI and XIV.

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8. See Indictment at appendix "A".

This conduct by the Louisiana Supreme Court renders Article XV Section 8 of the Articles of Incorporation of the Louisiana State Bar Association unconstitutional on its face and as it is factually applied in the instant proceeding.

Your petitioner was indicted under an indictment which mentions nothing about fiduciary relationship, non-disclosure, or any disciplinary rule governing an attorney's conduct. The indictment was for the crime of mail fraud.[9]

At the commissioner's hearing your petitioner was denied the opport-

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9. See Indictment at appendix "A".

unity to present any evidence inconsistent with his guilt for the crime of mail fraud and again, there was no mention at the commissioner's hearing of the violation of disciplinary rule 5-107, id. Indeed, the commissioner's findings stated on page 3 under the title "Conclusions":

> "Mr. Drury was found guilty of violating the mail fraud statute of the United States, 18 U.S.C. 1341."

It should be clear from the above that your petitioner was given no notice as to the accusation against him and that for which he was being tried during his trial and after the trial at the commissioner's hearing pursuant LSA--R.S. 37:4, Art. XV Section 8(7).

Never in the entire proceeding has your petitioner ever been afforded the opportunity to confront the issue as to whether or not he violated disciplinary rule 5-107. For the Louisiana Supreme Court to take that incidential finding by the federal district trial judge and make that the sole basis for disciplining your petitioner violates anyone's traditional notions of due process.

Under Louisiana jurisprudence in a proceeding pursuant to Article XV Section 8, a respondent attorney's due process rights are protected at the commissioner's hearing:

> "Procedure whereby hearing is held before commissioner as conditioned precedent to court taking disciplinary action against attorney after a final conviction provides due process." Louisiana State Bar Association v. Ponder, SUP. 1976, 340 So.2d 134, appeal dismissed, 97 S.Ct. 2643, 431 U.S. 934, 53 L.Ed.2d 251.

The record indicates that at the commissioner's hearing there was no mention of the violation of disciplinary rule 5-107. Indeed, the conclusion of the commissioner mentions nothing relative to disciplinary rule 5-107. There is but a vague reference under the title "Mitigating Circumstances":

> "The crux of the federal conviction is based upon Mr. Drury's failure to disclose to his clients the 15% which he received or for which he received credit for treatment by Dr. Macaluso to patients which he referred to the doctor."

This court has long recognized that the right to practice law is a property right. The above described action by the Louisiana Supreme Court is in direct violation of your petitioner's Fourteenth Amendment rights.

> "Nor shall any state deprive any person of life, liberty or property without due process of law. United States Constitution Amendment XIV.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the writ of certiorari should be granted.

Respectfully submitted:

EDWARD R. DRURY, PRO SE
904 NORTH BROAD AVENUE
NEW ORLEANS, LOUISIANA 70119
PHONE: 1-(504)-821-0442

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid on this 30 day of December, 1984.

EDWARD R. DRURY

APPENDIX "A"
INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INDICTMENT FOR MAIL FRAUD AND CONSPIRACY

UNITED STATES OF AMERICA CRIMINAL DOCKET NO. 81-285

v SECTION G

EDWARD R. DRURY VIOLATION: 18 U.S.C. §2
18 U.S.C. §371
18 U.S.C. §1341

Filed July 16, 1981

The Grand Jury charges that:

COUNT 1

A. AT ALL TIMES MATERIAL HEREIN:

1. Defendant EDWARD R. DRURY was a licensed attorney legally qualified by the State of Louisiana to practice law.

2. The vast majority of the clients represented by EDWARD R. DRURY had been involved in automobile accidents and were being represented by DRURY in connection with those automobile accidents.

3. The fee charged by DRURY to these automobile accident clients was forty percent (40%) of the settlement received from the insurance carrier.

4. Sam C. Macaluso was a licensed physician, legally qualified by the State of Louisiana to practice medicine.

5. Defendant EDWARD R. DRURY referred and caused to be referred to Sam C. Macaluso the majority of his automobile accident clients for medical treatment.

6. The practice of automobile insurance carriers in the New Orleans, Louisiana, area was, where their liability was clear, to settle out-of-court potential and actual bodily injury losses resulting from automobile accidents. These settlements were based primarily on the physician's medical report and bill for services rendered which indicated the number of months the physician treated the accident victim and the value of the physician's services.

B. THE CONSPIRACY

Beginning at a time to the Grand Jury unknown, but prior to January 1, 1975, and continuing thereafter until March 5, 1980, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY and Sam C. Macaluso, and others, knowingly and intentionally did combine, conspire, confederate and agree together, with each other, and others, to commit criminal offenses against the United States, to wit the Defendant DRURY, Sam C. Macaluso, and others conspired to unlawfully, willfully, and knowingly devise and intend to devise a scheme and artifice to defraud and for obtaining money and property from various insurance carriers in the New Orleans, Louisiana area, and from the clients of EDWARD R. DRURY, by means of false and fraudulent misrepresentations, pretenses and promises, well knowing the pretenses, representations, and promises would be and were false when made, in violation of Title 18, United States Code,

Section 1341.

C. WAYS, MEANS AND MANNER TO ACCOMPLISH THE CONSPIRACY

1. The vast majority of Defendant DRURY's clients were referred to Sam C. Macaluso for treatment of the injuries sustained in automobile accidents.

2. Sam C. Macaluso would and did submit medical reports and statements to EDWARD R. DRURY, knowing that DRURY would submit those reports and statements to insurance carriers as a basis for arriving at out-of-court settlements in bodily injury automobile accident cases.

3. Defendant DRURY would and did submit the medical reports and statements to insurance carriers as a basis for arriving at out-of-court settlements in bodily injury automobile accidents.

4. Defendant DRURY would and did subtract from each client's portion of the settlement an amount equal to the face amount of the medical statement (or bill) submitted by Sam C. Macaluso to Defendant DRURY and the insurance carrier.

5. Defendant EDWARD R. DRURY paid Sam C. Macaluso fifteen percent (15%) less than the face amount of Macaluso's statement (or bill) and Defendant DRURY at no time revealed this fact to the insurance carriers or to his clients.

6. EDWARD R. DRURY would and did increase his share of each settlement by inflating the total amount of the settlement by misrepresenting to the insurance carrier

the true amount that Sam C. Macaluso was to be paid for his medical services and by misrepresenting to his clients the amount which Sam C. Macaluso was actually charging for his services.

D. OVERT ACTS

In furtherance of the conspiracy and to accomplish the objects thereof, the defendant and others committed the following overt acts, among others, in the Eastern District of Louisiana and elsewhere:

1. During 1975 EDWARD R. DRURY arranged a meeting between Sam C. Macaluso, EDWARD R. DRURY, and another individual. At that meeting the Defendant DRURY requested Dr. Macaluso to treat all patients referred by DRURY and the other individual to Macaluso. A condition for the referral of these clients to Macaluso was that Macaluso agree to accept from DRURY and the other individual payment in an amount fifteen percent (15%) less than the face value of the bills or statements provided by Macaluso to DRURY and the other individual for forwarding to insurance carriers.

2. On or about January 28, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a medical statement of Sam C. Macaluso, concerning Oliver John Lucius, to Allstate Insurance Company.

3. On or about April 13, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a release concerning Oliver John Lucius, to Allstate Insurance Company.

4. On or about January 28, 1977, the Defendant

EDWARD R. DRURY mailed or caused to be mailed medical statements of Sam C. Macaluso, concerning Barbara Coleman and Gail Louise Williams, to Allstate Insurance Company.

5. On or about March 29, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed releases concerning Barbara Coleman and Gail Louise Williams, to Allstate Insurance Company.

6. On or about March 2, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a medical statement of Sam C. Macaluso, concerning Rhoda Gorman, to Fireman's Fund Insurance Company.

7. On or about March 22, 1977, Fireman's Fund Insurance Company mailed to EDWARD R. DRURY a settlement check.

8. On or about April 13, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a release concerning Rhoda Gorman, to Fireman's Fund Insurance Company.

9. On or about October 12, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a medical statement of Sam C. Macaluso, concerning Louis James, Jr., to Liberty Mutual Insurance Company.

10. On or about November 4, 1977, Liberty Mutual Insurance Company mailed to EDWARD R. DRURY a settlement check.

11. On or about November 10, 1977, Liberty Mutual Insurance Company mailed to EDWARD R. DRURY a

settlement check.

12. On or about April 4, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a medical statement of Sam C. Macaluso, concerning Donna Alexis to State Farm Insurance Company.

13. On or about May 10, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a releas concerning Donna Alexis to State Farm Insurance Company.

14. On or about March 21, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a medical statement of Sam C. Macaluso, concerning Alfred Green to State Farm Insurance Company.

15. On or about March 31, 1977, State Farm Insurance Company mailed to EDWARD R. DRURY a settlement check.

16. On or about April 28, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed a release concerning Alfred Green to State Farm Insurance Company.

17. On or about December 22, 1976, the Defendant EDWARD R. DRURY mailed or caused to be mailed a medical statement of Sam C. Macaluso, concerning Lawrence Brown to Crawford & Company.

18. On or about March 8, 1977, Crawford & Company mailed to EDWARD R. DRURY a settlement check.

19. On or about March 15, 1977, the Defendant

EDWARD R. DRURY mailed or caused to be mailed a release concerning Laurence Brown, to Crawford & Company.

20. On or about February 24, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed medical statements of Sam C. Macaluso, concerning Yvonne Barze and Catherine Coleman to Allstate Insurance Company.

21. On or about March 11, 1977, Allstate Insurance Company mailed to EDWARD R. DRURY two (2) settlement checks.

22. On or about March 29, 1977, the Defendant EDWARD R. DRURY mailed or caused to be mailed releases concerning Yvonne Barze and Catherine Coleman to Allstate Insurance Company.

23. On or about August 29, 1974, the Defendant EDWARD R. DRURY caused checks totalling Two Thousand One Hundred Fifteen Dollars ($2,115.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt dated August 29, 1974.

24. On or about October 31, 1974, the Defendant EDWARD R. DRURY caused checks totalling One Thousand Six Hundred Fifty Dollars ($1,650.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt signed by Sam C. Macaluso on or about October 31, 1974.

25. On or about November 8, 1974, the Defendant EDWARD R. DRURY caused checks totalling Three Thousand Seven Hundred Forty-eight Dollars ($3,748.00)

to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt signed by Sam C. Macaluso on or about November 8, 1974.

26. On or about January 17, 1975, the Defendant EDWARD R. DRURY caused checks totalling One Thousand Three Hundred Eighty-six Dollars ($1,386.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt signed by Sam C. Macaluso on or about January 17, 1975.

27. On or about January 25, 1975, the Defendant EDWARD R. DRURY caused a check in the amount of Ten Thousand Dollars ($10,000.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients not being named in the receipt signed by Sam C. Macaluso on or about January 25, 1975.

28. On or about July 23, 1975, the Defendant EDWARD R. DRURY caused a check in the amount of Seven Thousand Dollars ($7,000.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients not being named in the receipt signed by Sam C. Macaluso on or about July 23, 1975.

29. On or about November 14, 1975, the Defendant EDWARD R. DRURY caused a check in the amount of Eight Thousand One Hundred Fifty-five Dollars ($8,155.00) to be sent to Sam C. Macaluso for payment of certain clients, some of said clients being named in a receipt signed by Sam C. Macaluso on or about November 14, 1975.

30. On or about November 14, 1975, the Defendant EDWARD R. DRURY caused a check in the amount of Two Thousand Dollars ($2,000.00) to be sent to Sam C.

Macaluso for payment of certain clients, said clients not being named in the receipt signed by Sam C. Macaluso on or about November 14, 1975.

31. On or about March 12, 1976, the Defendant EDWARD R. DRURY caused a check in the amount of Two Thousand Dollars ($2,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

32. On or about March 12, 1976, the Defendant EDWARD R. DRURY caused a check in the amount of Five Thousand Dollars ($5,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

33. On or about June 14, 1976, the Defendant EDWARD R. DRURY caused a check in the amount of Five Thousand Dollars ($5,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

34. On or about August 11, 1976, the Defendant EDWARD R. DRURY caused a check in the amount of Ten Thousand Dollars ($10,000.00) to be sent to Sam C. Macaluso for payment of certain clients, some of said clients being named in a receipt signed by Sam C. Macaluso on or about August 11, 1976.

35. On or about September 10, 1976, the Defendant EDWARD R. DRURY caused a check in the amount of Ten Thousand Dollars ($10,000.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt signed by Sam C. Macaluso on or about September 10, 1976.

36. On or about October 28, 1976, the Defendant EDWARD R. DRURY caused a check in the amount of Ten

Thousand Dollars ($10,000.00) to be sent to Sam C. Macaluso for paynment of certain clients.

37. On or about December 3, 1976, the Defendant EDWARD R. DRURY caused three (3) checks totalling Twenty-Three Thousand Dollars ($23,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

38. On or about February 8, 1977, Sam C. Macaluso signed a receipt acknowledging payment in full for certain clients named in the receipt.

39. On or about March 30, 1977, the Defendant EDWARD R. DRURY caused a check in the amount of Ten Thousand Dollars ($10,000.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt signed by Sam C. Macaluso on or about April 1, 1977.

40. On or about May 6, 1977, the Defendant EDWARD R. DRURY caused a check in the amount of Ten Thousand Dollars ($10,000.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt signed by Sam C. Macaluso on or about May 6, 1977.

41. On or about June 15, 1977, the Defendant EDWARD R. DRURY caused a check in the amount of Three Thousand Dollars ($3,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

42. On or about June 30, 1977, the Defendant EDWARD R. DRURY caused a check in the amount of Five Thousand Dollars ($5,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

43. On or about September 20, 1977, the Defendant EDWARD R. DRURY caused a check in the amount of Five Thousand Dollars ($5,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

44. On or about October 3, 1977, the Defendant EDWARD R. DRURY caused a check in the amount of Three Thousand Dollars ($3,000.00) to be sent to Sam C. Macaluso for payment of certain clients.

45. On or about November 18, 1977, Sam C. Macaluso signed a receipt acknowledging payment in full for certain clients named in the receipt.

46. On or about November 18, 1977, the Defendant EDWARD R. DRURY caused a check in the amount of Five Thousand Dollars ($5,000.00) to be sent to Sam C. Macaluso for payment of certain clients, said clients being named in a receipt signed by Sam C. Macaluso on or about November 18, 1977.

All in violation of Title 18, United States Code, Section 371.

COUNT 2

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

Beginning at a time unknown to the Grand Jury but prior to January 1, 1975, and continuing on or about March 5, 1980, in the Eastern District of Louisiana, EDWARD R. DRURY did unlawfully, willfully, and knowingly devise

and intend to devise a scheme and artifice to defraud and for obtaining money and property from various insurance carriers in the New Orleans, Louisiana, area, as well as from the clients of DRURY, by means of false and fraudulent representations, pretenses and promises, as set forth more fully above, well knowing the pretenses, representations, and promises would be and were falsely made. The object of this scheme was to cause insurance carriers to pay inflated settlements based on false medical statements, as well as to cause the clients of DRURY to pay expenses in excess of that which were incurred.

On or about January 28, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Allstate Insurance Company, District Claim Office, 3330 Veterans Boulevard, Metairie, Louisiana 70001, Attn: Jerri Dybendal, from EDWARD R. DRURY, containing, among other things, copies of a medical report and statement of Sam C. Macaluso dated January 27, 1977, concerning Oliver John Lucius.

All in violation of Title 18, United States Code, Section 1341.

COUNT 3

Section A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and

incorporated herein by reference as though each allegation were set forth herein at length.

On or about April 13, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do do, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Allstate Insurance Company, District Claim Office, 3330 Veterans Boulevard, Metairie, Louisiana 70001, Attn: Jerri Dybendal, from Clark A. Richard, containing, among other things, a release dated March 22, 1977, signed by Oliver John Lucius.

All in violation of Title 18, United States Code, Section 1341.

COUNT 4

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about January 28, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Allstate Insurance

Company, District Claim Office, 3330 Veterans Boulevard, Metairie, Louisiana 70001, from EDWARD R. DRURY, containing, among other things, copies of medical reports and statements of Sam C. Macaluso dates January 26, 1977, concerning Barbara Coleman and Gail Louise Williams.

All in violation of Title 18, United States Code, Section 1341.

COUNT 5

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 29, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Allstate Insurance Company, District Claim Office, 3330 Veterans Boulevard, Metairie, Louisiana 70001, Attn: Mike Broussard, from Clark A. Richard, containing, among other things, releases dated March 28, 1977, signed by Barbara Coleman and Gail Louise Williams.

All in violation of Title 18, United States Code, Section 1341.

COUNT 6

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 2, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Fireman's Fund Insurance Company, 2330 Canal Street, New Orleans, Louisiana 70119, Attn: Mr. Gilbert Smith, from EDWARD R. DRURY, containing, among other things, copies of a medical report and statement of Sam C. Macaluso dated February 28, 1977, concerning Rhoda Gorman.

All in violation of Title 18, United States Code, Section 1341.

COUNT 7

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 22, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the

purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to EDWARD R. DRURY, Esquire, 904 N. Broad Street, New Orleans, Louisiana, from Fireman's Fund Insurance Company, containing, among other things, a settlement check in the amount of Three Thousand One Hundred Dollars ($3,100.00), made payable to Rhoda Gorman and her attorney, EDWARD R. DRURY.

COUNT 8

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about April 13, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Fireman's Fund Insurance Company, 2330 Canal Street, New Orleans, Louisiana 70119, Attn: Mr. Gilbert Smith, from EDWARD R. DRURY, containing, among other things, a release signed by Rhoda Gorman on March 28, 1977.

All in violation of Title 18, United States Code, Section 1341.

COUNT 9

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about October 12, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Mrs. Cynthia A. Carrillo, Liberty Mutual Insurance, 3501 N. Causeway Boulevard, Metairie, Louisiana 70002, from EDWARD R. DRURY, containing, among other things, copies of a medical report and statement of Sam C. Macaluso dated September 21, 1977, concerning Lewis James, Jr.

All in violation of Title 18, United States Code, Section 1341.

COUNT 10

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about November 4, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY,

for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to EDWARD R. DRURY, Esquire, 904 N. Broad Street, New Orleans, Louisiana, from Liberty Mutual Insurance Company, containing, among other things, a settlement check in the amount of Two Thousand Five Hundred Dollars ($2,500.00), made payable to Lewis James, Jr., and his attorney, EDWARD R. DRURY.

All in violation of Title 18, United States Code, Section 1341.

COUNT 11

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about November 10, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to EDWARD R. DRURY, Esquire, 904 N. Broad Street, New Orleans, Louisiana, from Liberty Mutual Insurance Company, containing, among other things, a settlement check in the amount of

One Thousand Dollars ($1,000.00), made payable to Lewis James, Jr., and his attorney, EDWARD R. DRURY.

All in violation of Title 18, United States Code, Section 1341.

COUNT 12

Section A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about April 4, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to State Farm Insurance Company, 2900 Clearview Parkway, Metairie, Louisiana 70002, Attn: Richard Bordelon, from EDWARD R. DRURY, containing, among other things, copies of a medical report and statement of Sam C. Macaluso dated April 1, 1977, concerning Donna Alexis.

All in violation of Title 18, United States Code, Section 1341.

COUNT 13

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second para-

graph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length:

On or about May 10, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to State Farm Insurance Company, Attn: Richard Bordelon, from Clark A. Richard, containing, among other things, a release signed by Donna Alexis on May 5, 1977.

All in violation of Title 18, United States Code, Section 1341.

COUNT 14

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 21, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to State Farm Insurance Company,

2900 Clearview Parkway, Metairie, Louisiana 70002, Attn: Claim Department, from EDWARD R. DRURY, containing, among other things, copies of a medical report and statement of Sam C. Macaluso dated March 18, 1977, concerning Alfred Green.

All in violation of Title 18, United States Code, Section 1341.

COUNT 15

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 31, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to EDWARD R. DRURY, Esquire, 904 N. Broad Street, New Orleans, Louisiana, from State Farm Insurance Company, containing, among other things, a settlement check in the amount of Two Thousand Seven Hundred and Forty Dollars ($2,740.00), made payable to Alfred Green and his attorney, EDWARD R. DRURY.

All in violation of Title 18, United States Code, Section 1341.

COUNT 16

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about April 28, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to State Farm Insurance Company, 2900 Clearview Parkway, Metairie, Louisiana 70002, Attn: Claims Department, from Clark A. Richard, containing, among other things, a release signed by Alfred Green on April 26, 1977.

All in violation of Title 18, United States Code, Section 1341.

COUNT 17

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about December 22, 1976, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and

artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representation and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Crawford & Company, 3645 I-10 Service Road, P.O. Box 8065, Metairie, Louisiana 70011, Attn: Kenneth Ricau, from EDWARD R. DRURY, containing, among other things, copies of a medical report and statement of Sam C. Macaluso dated November 20, 1976, concerning Lawrence Brown.

All in violation of Title 18, United States Code, Section 1341.

COUNT 18

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 8, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to EDWARD R. DRURY, Esquire, 904 N. Broad Street, New Orleans, Louisiana, from Crawford & Company, containing, among other things, a settlement check in the amount of Two Thousand Two Hundred and Fifty Dollars ($2,250.00), made payable to Laurence C. Brown, and his attorney, EDWARD R. DRURY.

All in violation of Title 18, United States Code, Section 1341.

COUNT 19

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 15, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Kenneth Rican, Crawford & Company, 3645 I-10 Service Road, P.O. Box 8065, Metairie, Louisiana 70011, from Clark A. Richard, containing, among other things, a release signed by Lawrence Brown on March 17, 1977.

All in violation of Title 18, United States Code, Section 1341.

COUNT 20

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about February 24, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Allstate Insurance Company, 3330 Veterans Boulevard, Metairie, Louisiana 70001, Attn: Jamie Gonzalez, containing, among other things, copies of medical reports and statement of Sam C. Macaluso dated February 9, 1977, and February 17, 1977, concerning Yvonne Barze and Catherine Coleman.

All in violation of Title 18, United States Code, Section 1341.

COUNT 21

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 11, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to EDWARD R. DRURY, Esquire, 904 N. Broad Street, New Orleans, Louisiana from Allstate Insurance Company, containing, among other things, a

settlement check in the amount of Two Thousand Seven Hundred Dollars ($2,700.00), made payable to Yvonne Barze, and her attorney, EDWARD R. DRURY, and a settlement check in the amount of Two Thousand Seven Hundred Forty-seven Dollars and Thirty-four cents ($2,747.34) made payable to Catherine Coleman, and her attorney, EDWARD R. DRURY.

All in violation of Title 18, United States Code, Section 1341.

COUNT 22

Sections A(1) through A(6) and sections C(1) through C(6) of Count 1 of this indictment, and the second paragraph of Count 2 of this indictment, are re-alleged and incorporated herein by reference as though each allegation were set forth herein at length.

On or about March 29, 1977, in the Eastern District of Louisiana, Defendant EDWARD R. DRURY, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, did knowingly cause to be delivered by mail, according to the direction thereon, an envelope addressed to Allstate Insurance Company, 3330 Veterans Boulevard, Metairie, Louisiana 70001, Attn: Jamie Gonzalez, from Clark A. Richard, containing, among other things, releases signed on March 29, 1977, by Yvonne Barze and Catherine Coleman.

All in violation of Title 18, United States Code, Section 1341.

A TRUE BILL

/S/ JOSEPH MANEY
FOREMAN

/S/ JOHN VOLZ
JOHN VOLZ
UNITED STATES ATTORNEY

/S/ RICHARD T. SIMMONS, JR.
RICHARD T. SIMMONS, JR.
Assistant United States Attorney
Chief, Criminal Division

/S/ MICHAEL SCHATZOW
MICHAEL SCHATZOW
Assistant United States Attorney
Chief of Trials

New Orleans, Louisiana
July 10, 1981

APPENDIX B

SPECIAL FINDINGS OF THE DISTRICT COURT

MINUTE ENTRY
SEAR, J.
December 22, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA CRIMINAL ACTION

versus No. 81-285

EDWARD R. DRURY SECTION "G"

Filed December 22, 1981

Edward R. Drury, a lawyer authorized to practice in the State of Louisiana,[1] was charged with one count of conspiracy to violate the federal mail fraud statute and twenty-one substantive mail fraud offenses, in violation of 18 U.S.C. §§ 371, 1341.[2] Drury waived trial by jury and following a two day trial, I found him not guilty of

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[1] Stipulation four between the parties, filed on November 23, 1981 provides:

> At all times material to the indictment and the trial of this case the defendant EDWARD R. DRURY was an attorney, legally qualified by the State of Louisiana to practice law.

[2] Section 371 of Title 18, United States Code, provides in part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

conspiracy and guilty of each of the substantive crimes.

Prior to trial the government and the defendant stipulated that the materials alleged in the indictment to have been mailed were, in fact, mailed.[3]

The evidence established that Drury was engaged primarily in the practice of representing persons who had been injured in automobile accidents. The employment contract between the defendant and his client typically provided a contingent fee of 40% of all monies collected

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(Footnote 2 continued)

Section 1341 of Title 18, United States Code, states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[3] Stipulation one entered into by the government and the defendant provides:

> The materials alleged to have been delivered by mail in counts 2-22 of the indictment, were in fact delivered by mail on or about the dates referred to in counts 2-22 of the indictment.

to be paid to Drury.[4]

Clients who had not yet consulted a physician were referred by Drury or his secretary to various physicians for treatment but two-thirds were referred to Dr. Sam C. Macaluso.

In or about September of 1975, Drury and his then associate James Kambur met with Dr. Macaluso to discuss their business relationship. At that meeting it was suggested that Macaluso prolong the treatment of personal injury patients referred by Drury and Kambur and, in return for a large volume of referrals, the lawyers demanded 15% of the doctor's fees in connection with the treatment of the referred patient. Macaluso refused to prolong his medical treatment but he did agree to pay the lawyers the 15% of his fee they required.

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[4] The standard form contract employed by Drury provided:

> THIS AGREEMENT ENTERED INTO THIS _____ DAY OF _____, 19__, I _____ DO hereby retain, EDWARD R. DRURY, as my attorney, to represent me and act for me in my stead in any and all claims, matters, or proceedings which I have had or may have against _____ and/or their insureres[sic], as a result of any injuries, illnesses or damages sustained by me in an _____accident on the _____ day of _____, 19__ at _____
>
> For and in consideration of the services of the said attorney, I do hereby assign FORTY (40%) percent of all monies collected from the said _____ and/or insurers, including all monies collected by compromises, settlements, or litigations, irrevocably to the said attorney. All compromises and/or settlements are to be signed by me and by the said attorney, EDWARD R. DRURY.
>
> _____ _____
>
> _____
>
> _____

In cases involving soft tissue injuries in which liability was not in dispute, Drury submitted to the appropriate insurance carrier a claim for payment which included as an item of damage the charge for professional services performed by Macaluso. The doctor charged the referral patients the same amount he would have charged his own patients or patients referred by other attorneys.[5]

In adjusting an injury claim submitted by Drury in behalf of one of his clients, the insurance carrier included the entire amount of the doctor's bill in the settlement as payment for the client's out-of-pocket expenses. In calculating the client's pain and suffering, the insurance companies relied at least in part on the length of the doctor's treatments and the cost of medical services as reflected in Dr. Macaluso's report and bill.

After receipt of the funds in settlement of the claim, Drury deducted first his 40% contingent fee and then the full amount of Dr. Macaluso's bill. He remitted whatever remained to his client. In turn, Drury paid Macaluso only 85% of the amount shown on the doctor's statement and kept the remaining 15% for himself. Drury never disclosed to a client that 15% of the doctor's bill was retained.

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[5] Stipulation three between the government and Drury reads:

> The amount charged by Dr. Macaluso to his patients who were also clients of EDWARD R. DRURY was the same amount that he would have charged any patient, either his own private patient or a patient who was referred to him by another attorney, for the same treatment.

Conviction for a violation of the federal mail fraud statute requires proof of the existence of (1) a scheme to defraud; and (2) use of the mails for the purpose of executing the scheme. *United States v. Toney*, 605 F.2d 200 (5th Cir. 1979); *United States v. Schaffer*, 599 F.2d 678 (5th Cir. 1979). The statute does not provide any definition of fraud, because, as the Fifth Circuit has pointed out, "it needs no definition; it is as old as falsehood and as versable as human ingenuity." *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir.), *cert. denied*, 314 U.S. 711 (1941).

The Fifth Circuit and other circuit courts have recognized that schemes to defraud in violation of § 1341 fall into two general categories. In the first, the object of the scheme is to deprive the victims of money or other valuable personal property. In the second, the scheme operates to deprive the victim of valuable intangible rights or opportunities. *United States v. Bohonus*, 628 F.2d 1167 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980); *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981); *United States v. States*, 488 F.2d 761 (8th Cir. 1973). Courts have condemned as schemes falling in the second category: attempts to obtain absentee ballots to stage an imaginary write-in campaign, *United States v. States*, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974), bribery of a public official depriving the public of its right to the official's disinterested services, *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980), and the acceptance by an employee of concealed gratuities for depriving his employer of his right to the loyal and honest services of his agent. *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981); *United States v. Bohonus*, 628 F.2d 1167 (9th Cir. 1980), *cert. denied*, 447 U.S. 928 (1980); *United States v. George*, 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973).

The indictment charged Drury in Counts Two through Twenty-two with defrauding his clients in violation of § 1341. As to these counts then, the first issue to be determined is whether Drury's actions with regard to his clients constituted a scheme to defraud.

Drury, as a lawyer, operated under a much heavier obligation than the general duty of loyalty of an employee towards his employer. Under Louisiana law, an attorney owes his client a duty of conducting their relationship in perfect fairness and honesty. *Feldheim v. Plaquemines Oil and Development Co.*, 282 So.2d 469 (La. 1973); *Louisiana State Bar Association v. Van Buskirk*, 249 La. 781, 191 So.2d 497 (1966). Louisiana courts have held that "[i]n no other agency relationship is a greater duty of trust imposed than in that involving an attorney's duty to his client or his former client." *Cattle Farms, Inc. v. Abercrombie*, 211 So.2d 354 (La. App. 1968).

In addition to his general fiduciary duty, Drury was bound as a matter of substantive Louisiana law by provisions of the Code of Professional Responsibility. *Simon v. Metoyer*, 383 So.2d 1321 (La. App. 1980). His acceptance of a referral fee violated Disciplinary Rule 5-107 which provides in pertinent part:

> (A) Except with the consent of his client after full disclosure, a lawyer shall not:
>
> (1) Accept compensation for his legal services from one other than his client.
>
> (2) Accept from one other than his client anything of value related to his representation of or his employment by his client.

While breach of a fiduciary duty may constitute the object of the scheme to defraud, for purposes of § 1341, mere breach of a fiduciary duty does not by itself constitute a scheme to defraud in violation of the mail fraud statute. *United States v. McNeive,* 536 F.2d 1245 (9th Cir. 1976). A breach of a fiduciary duty only becomes a violation of § 1341, when it is coupled with concealment or misrepresentations of material facts in a plan to deceive. *United States v. Bush,* 522 F.2d 641, 648 (7th Cir. 1975), *cert. denied,* 424 U.S. 977 (1976).

The evidence established that Drury had adopted a practice and policy of representing the victims of automobile accidents without revealing the existence of his referral fee arrangement with Dr. Macaluso. As a result they lost the opportunity to negotiate with Drury on fair terms regarding the conditions and fee arrangements of their employment with him. The opportunity to bargain with the full knowledge of all proper material information constitutes a valuable intangible interest protected under § 1341. *United States v. George,* 477 F.2d 508 (7th Cir.), *cert. denied,* 414 U.S. 827 (1973). The clients also lost the right to retain an attorney who, unlike Drury, was not engaged in blatant violations of the Code of Professional Responsibility.

The evidence further established that Drury allowed his financial interest in Dr. Macaluso to affect the professional services that he rendered to his clients. The nondisclosure of the existence of the arrangement and the consequent breaches of Drury's fiduciary duty were not made innocently but with the specific intent to defraud the clients of their rights arising out of the relationship between themselves and Drury. Thus I conclude that Drury was engaged in a scheme to defraud for purposes of § 1341.

The final element in proving a violation of § 1341 is the existence of a mailing in furtherance of the scheme to defraud. This element of § 1341 is satisfied if (1) Drury caused the mailings to occur and (2) the mailings were for the purpose of executing the scheme to defraud. *United States v. Rodgers,* 624 F.2d 1303 (5th Cir. 1980); *United States v. Shryock,* 537 F.2d 207 (5th Cir. 1976), *cert. denied,* 429 U.S. 1100 (1977). An individual causes a mailing if he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be forseen." *Pereira v. United States,* 354 U.S. 1, 8-9, (1954). The mailings alleged in the indictment consisted of correspondence with regard to the claims of Drury's clients between Drury and the various insurance companies. Obviously, Drury "caused" all these mailings for purposes of the statute. It is just as clear that this business correspondence was an integral part of Drury's representation of his clients and of his arrangement with Dr. Macaluso to collect a referral fee. With this last finding, I conclude that the government has met its burden of proving beyond a reasonable doubt each element of the violations of 18 U.S.C. § 1341 alleged in Counts Two through Twenty-two of the indictment insofar as they charge an illegal defraudment of the defendant's clients.

In addition to charging violations of § 1341 with respect to Drury's clients, Counts Two through Twenty-two of the indictment accuse Drury of violations of § 1341 with respect to various insurance companies with which he dealt in the course of representing his clients.

Although the definition of fraudulent conduct is broadly drawn, the Fifth Circuit has required that the statute be strictly construed to avoid expanding its scope to cover activities that Congress never intended to reach.

United States v. Edwards, 458 F.2d 875 (5th Cir.), *cert. denied*, 409 U.S. 891 (1972). Thus, to sustain a conviction under § 1341, the United States must establish that the alleged scheme to defraud operates to deprive the victim of a substantial interest. *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981).

The referral fee arrangement between the defendant and Dr. Macaluso did not deprive the insurance companies of any valuable tangible or intangible rights. Dr. Macaluso charged the defendant's clients the same that he would have charged them if they had retained his services on their own initiative, and he treated these patients at the same level of care that he provided his other patients. None of the medical reports were false in the sense that they described treatments that did not occur or injuries that the patient had not, in fact, suffered. Whatever the nature of the arrangement between the doctor and Drury, the client was out-of-pocket to the extent of the doctor's bill. That the doctor chose to pay a portion of his fee to Drury does not lessen in any way the insurance company's obligation to make the client whole.

The only loss the insurance companies suffered as a result of the 15% referral fee arrangement was the opportunity to conduct an independent probe of the arrangement. Drury owed no fiduciary duty to the insurance companies. His relationship was that of an adversary. Consequently, I conclude that Congress could not have intended the mail fraud statute to cover schemes that operate to deprive their victims of such an insubstantial interest, and I find the defendant not guilty of any violations of § 1341 with respect to the insurance companies.

The remaining count of the indictment, Count One

alleges that Drury conspired with Dr. Macaluso and an unnamed third person to violate § 1341 in defrauding the insurance companies and Drury's clients. Since I find that there was no defraudment of the insurance companies, the only issue is whether Dr. Macaluso or the unnamed third person conspired with Drury to conceal the 15% arrangement from Drury's clients. No proof was ever introduced that Dr. Macaluso or the unnamed third person knew whether the 15% went completely into Drury's pocket or was shared, in whole or in part, with the client. The government also failed to introduce any evidence as to whether Dr. Macaluso or the unnamed third person knew anything about what Drury did or did not tell his clients. I therefore find that the government failed to establish an essential element of 18 U.S.C. § 371, the existence of an agreement to commit an unlawful act. *United States v. Arrendondo-Morales,* 624 F.2d 681 (5th Cir. 1980); *United States v. Alvarez,* 610 F.2d 1250 (5th Cir. 1980). Consequently, I find Drury not guilty of the charge embodied in Count One of the indictment.

/S/ MOREY L. SEAR

MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

JUDGMENT OF THE UNITED STATES COURT OF APPEALS

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

EDWARD R. DRURY
Defendant-Appellant.

NO. 84-3101

United States Court of Appeals,
Fifth Circuit.

October 31, 1984

Before Gee, Reavley and Davis, Circuit Judges. PER CURIAM: *

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposed needless expenses on public and burden on the legal profession." Pursuant to that rule, the Court has determined that this opinion should not be published.

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The appellant Edward R. Drury, an attorney practicing in the New Orleans area, was indicted by a federal grand jury on twenty-one counts of mail fraud and one count of conspiracy to commit mail fraud. The indictment arose from the appellant's participation in a kickback" scheme with Dr. Sam Macaluso. Under this scheme, the appellant would refer his personal-injury clients to Dr. Macaluso and bill the insurance company involved in the case for Dr. Macaluso's services. Instead of paying Dr. Macaluso the full amount of the medical portion of the insurance settlement, however, the appellant would keep 15% of this portion as a "referral fee."

After a bench trial, the district court acquitted the defendant on the

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conspiracy charge, but found him guilty on each of the twenty-one counts of mail fraud. On the first count, the court sentenced the appellant to five years imprisonment, with all but four months suspended. The court imposed the same term of imprisonment for each of the remaining counts, to run concurring with the first count, and fined the appellant $1000 on each of the remaining counts.

The appellant appealed his conviction to this Court, which affirmed the district court. United States v. Drury, 687 F.2d 63 (5th Cir. 1982). After this Court denied the appellant's motion for rehearing en banc, the United States Supreme Court denied the appellant's petition for a writ of certiorari. The appellant then brought a collateral

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attack upon his conviction and is before this court appealing the district court's denial of a writ of habeas corpus and of his request for an evidentuary hearing.

The appellant reargues in this collateral procedure the same points that he asserted on direct appeal. Although our opinion in the appellant's direct appeal discusses these sufficiently, in our view, we here reiterate briefly our views regarding his various claims.

Sufficiency of the evidence

Appellant first contends that the prosecution presented insufficient evidence to support his conviction for mail fraud. An examination of the record, however, indicates that the prosecution presented much evidence at trial to support the conviction. Furthermore, be-

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cause the appellant pressed this argument unsuccessfully on direct appeal, he is barred from raising it now. United States v. Johnson, 615 F.2d 1125, 1128 (5th Cir. 1980); United States v. Greer, 600 F.2d 469 (5th Cir. 1979).

Variance

The appellant also contends, as he did on direct appeal, that a variance existed between the grand jury indictment and the government's theory at trial. Specifically, the appellant contends that the government's theory at trial dealt with violations of the Louisiana Code of Professional Responsibility, an area the grand jury did not address. Although the record reflects some discussion of ethical violations and breaches of a fiduciary

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relationship, the record clearly indicates that no fatal variance between the indictment and the trial theory occurred. The appellant's contention that he was without notice of the charges against him is without merit.

Prosecutorial misconduct, ineffective assistance of counsel judicial misconduct

The appellant's final three contends are also without merit. There is no basis in the record for appellant's assertion that the prosecutor lied to the grand jury. The appellant's retained counsel appears to have represented the appellant zealously through both the trial and the direct appeal process. That the appellant's counsel made no post-trial motions appears to have been the result of a tactical decision upon which both the appellant and his attorney agreed, rather than the

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result of the attorney's incompetence. Finally, the trial judge appears to have conducted the proceedings fairly, giving appellant's counsel every opportunity to present his arguments. The appellant certainly suffered no prejudice from the trial judge's conduct or comments.

AFFIRMED.

APPENDIX "D"

OPINION OF THE COMMISSIONER,
JAMES W. HAILEY, JR.

FINDINGS OF FACTS

Mr. Edward R. Drury, a lawyer authorized to and practicing in the State of Louisiana, was charged with 23 counts of mail fraud in an indictment filed in the United States District Court, Eastern District of Louisiana on July 10, 1981. The first count was one of conspiracy to violate 18 U.S.C. 371. Counts two through twenty-two involved charges of violation of mail fraud, Statute 18 U.S.C. 1341.

After a trial before Judge Morey L. Sear, November 23 and 24, 1981, a minute entry was issued on December 22, 1981 followed by a "Judgment and Probation/Committment Order" issued

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January 13, 1982. In the judgment, Mr. Drury was found guilty (apparently as of November 24, 1981) to counts two through twenty-two. Judge Sear sentenced him to imprisonment for a term of five years requiring confinement in a "jail type institution" for four months, followed by probation for three years. Mr. Drury has served his time and now remains on probation for over two and a half more years.

A reading of the indictment indicates that each of counts two through twenty-two charge defendant with violations of 1341 with respect to his clients, as well as to various insurance companies. Judge Sear in his minute entry makes it clear that he found Mr. Drury guilty with respect to the clients and on page eight found

"... the defendant not guilty of any violations of 1341 with respect to the insurance companies."

While the conviction was being appealed the Committee on Professional Liability held a hearing on April 7, 1982 and determined that the crime of which defendant had been convicted" ... consituted a serious crime, felony, and one the necessary elements of which, as determined by statutes defining such crimes, . . . reflect upon the respondent's moral fitness to practice law."

The Supreme Court of Louisiana concurred with the Committee, and on September 2, 1982, suspended Mr. Drury from the practice of law.

The U.S. Court of Appeals affirmed and the United States Supreme Court denied writs. Thus, the judgment of

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the United States District Court is now final. Mr. Clark A. Richard, Mr. Drury's counsel, agreed that the judgment is final although he indicated that there was a collateral attack being attempted.

COMMENTS

Your Commissioner has read everything presented to him in this record with the exception of the 408 page transcript of the United States District Court proceedings. Mr. Clark Richard filed the transcript and when asked if he wanted the Commissioner to read it, he replied that it would be unnecessary, that he just wanted the record to be available if Mr. Richard A. Deas, attorney for the Committee, wanted to point out any criminal activity not stated in Judge Sear's minute entry or judgment.

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Mr. Deas was so informed and did not so wish. It would be appreciated if the Commissioner would be notified by the parties, or their attorney, if the above understanding is not correct or if the Supreme Court wants the Commissioner to read the federal court transcript.

The Commissioner realizes that the Court will probably read, with the possible exception of the very lengthy federal trial transcript, all of the pertinent parts of the record. However, in any event, it is humbly suggested that the Court review the transcript of the Commissioner's hearing and the minute entry, the latter to discern Judge Sear's other findings, which would have been too cumbersome to have been listed in the Findings of Facts.

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CONCLUSIONS

Mr. Drury was found guilty of violating the mail fraud statute of the United States--18 U.S.C. 1341.

The Louisiana Supreme Court concurred with the Committee on Professsional Responsibility that the crime was a felony, serious, that a necessary element reflected upon the defendant's moral fitness to practice law and suspended him from the practice of law by order dated September 2, 1982.

MITIGATING CIRCUMSTANCES

The crux of the federal conviction is based upon Mr. Drury's failure to disclose to his clients the "15%" which he received or for which he received credit for treatment by Dr. Macaluso to patients which he referred to the doctor.

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Mr. Drury explained in detail at the original hearing the "history" of the "15%". Summarizing from pages 27-30 of that hearing, he said Dr. Macaluso was supposed to be paid for a particular case when that case settled. Dr. Macaluso would send defendant a letter requesting payment on several cases some of which had been paid. Through an administrative mix-up at defendant's office, some bills would be paid twice. Thus, Dr. Macaluso and Mr. Drury had a conference and since the doctor did not have sufficient funds to pay back bills which had been paid twice, they agreed to a credit or set-off. As Mr. Drury's practice grew, the problems grew with it, and Dr. Macaluso increasingly demanded double payment. Mr. Drury suggested that he pay the doctor 85% and withhold 15% for any difficulties and

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which would be compensation for additional administration burden which the problem placed upon his office.

He testified in the October 11, 1983 hearing before your Commissioner that he never discussed with Dr. Macaluso how long the doctor was going to treat his clients or how much the doctor was going to charge. He said his agreement with the doctor did not affect his representation of his clients in any way albeit Judge Sear found, minute entry, pag. 5,6 that, "The evidence further established that Drury allowed his financial interest in Dr. Macaluso to affect the professional services that he rendered to his clients." Mr. Drury stated that there was no evidence at the federal trial that the doctor charged his clients more than any other patients. (It was stipulated between

the government and defendant that the amount charged by Dr. Macaluso to his patients referred by defendant was the same amount the doctor would have charged any other patient whether private or referred by another attorney for the same treatment. (See footnotes of U.S.D.C. minute entry)

To summarize the mitigating circumstances it appears that the main reason for the conviction was Mr. Drury's failure to reveal to his clients the arrangement with Dr. Macaluso, that his clients were charged the same amount the doctor would have charged if they had not been defendant's clients although they were found to have" . . . lost the opportunity to negotiate with Drury on fair terms regarding conditions and fee arrangements of their employment with him", minute entry, pg. 5, and, finally, the

fact that Mr. Drury has already been suspended for almost one year and five months.

Respectfully submitted:

JAMES W. HAILEY, JR.
Commissioner
P.O. Box 8288
3121 21st St. (70002)
Metairie, LA. 70011-8288
Tel. 834-9252

APPENDIX "E"

DISCIPLINARY PROCEEDING
OF THE SUPREME COURT OF LOUISIANA

LOUISIANA STATE BAR ASSOCIATION

v.

EDWARD R. DRURY

NO. 82-B-2143

Sept. 10, 1984

DENNIS, Justice.

The Louisiana State Bar Association, through its Committee on Professional Responsibility, instituted this disbarment proceeding against Edward R. Drury. The basis was Drury's conviction in federal court of mail fraud. After the conviction, Drury was suspended from the practice of law. A hearing was held before a commissioner appointed by this court. The commissioner verified the conviction and made findings as to some of the surrounding circumstances, but he

did not recommend any particular disciplinary action.

FACTS

The charges against Drury arose out of his practice of sending most of his clients with personal injury claims to Dr. Sam Macaluso for treatment and evaluation. The doctor examined the clients and prepared medical reports for submission to insurance companies in furtherance of settling the clients' claims. Macaluso sent bills to Drury, rather than the patients, and his fees were later subtracted from the ultimate insurance recovery. According to Drury's testimony at the commissioner's hearing, Dr. Macaluso kept poor records which caused him to double bill Drury's clients and to render late bills on many occasions. Drury alleges that after a period of time he realized

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that he had paid many of his clients' doctor bills twice, and as a consequence the doctor was in debt to him. The attorney claims that despite problems caused by the doctor's disorganized billing system he continued to send clients to Macaluso because, unlike some other physicians, Macaluso did not object to seeing them although many were poor, ignorant and unwashed. To provide a check upon the doctor's propensity of overbill, Drury testified he established a practice of withholding 15% from the payment of each doctor bill. He claimed that he used these funds with the doctor's permission to offset the doctor's frequent overbillings that were often discovered only after their initial payment and to compensate himself for administrative costs of handling medical bills. While the clients were aware of and agreed to Drury's deduction of his fee and the

doctor's bills from their recovery, they were not informed that the lawyer withheld 15% of the medical fees from the doctor. Drury failed to give any specific amount owed by the doctor or to fix a date on which deductions were to cease. In fact, the 15 percent deduction practice continued from 1975 until 1981 when Drury was indicted by a grand jury on 21 counts of mail fraud and one count of conspiracy to commit mail fraud.

Drury was convicted of 21 counts of mail fraud by a federal district judge, after waiving his right to a jury trial. He was sentenced to five years in prison. After he served four months in confinement in a "jail-type institution," the balance of his sentence was suspended and he was placed on probation for three years and required to pay a $20,000 fine.

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The federal court of appeals affirmed the conviction and the district court's reasoning. United States v. Drury, 687 F. 2d 63 (5th Cir. 1983).

Drury was charged with one count conspiracy and with defrauding both his clients and insurance companies. He was not convicted on defrauding insurers, and he was acquited of the conspiracy charge. The federal district court found that Dr. Macaluso charged Drury's clients the same fee that he would have charged them had they approached him of their own initiative, and that he rendered the same degree of care in treating them. The trial judge noted, "(n)one of the medical reports were false in the sense that they described treatment that did not occur or injuries that the patient had not, in fact, suffered."

The committee urges this court to disbar Drury in view of his final conviction; his breach of fiduciary duty, including depriving his clients of the right to retain an attorney not engaged in blatant violation of the Code of Professional Responsibility; and for his acting with specific intent to defraud his clients.

Drury argues that the basis for his mail fraud conviction, as reflected by the judge's reasons, was the judge's finding that Drury violated disciplinary rule 5-107. The respondent admits that he stands convicted of a federal felony but he expresses doubt that he violated DR 5-107 since he claims its meaning and applicability to this case are uncertain.

According to the federal district court's opinion, conviction of a violation of the federal mail fraud statute requires proof of the existence of (1) a scheme to defraud; and (2) use of the mails for the purpose of executing the scheme. Under the jurisprudence of the Fifth Circuit and other federal courts of appeals, schemes to defraud fall into two general categories: In the first, the object of the scheme is to deprive the victims of money or other valuable personal property. In the second, the scheme operates to deprive the victim of valuable intangible rights or opportunities.

The federal district court found Drury innocent of the first type of fraud, the object of which is to deprive victims of money or other valu-

able personal property. However, the court found Drury guilty of fraud in the second sense of depriving his clients of valuable rights or opportunities. The court reasoned that: Drury violated professional disciplinary rule 5-107; this violation constitutes a breach of his fiduciary duty to his clients; he concealed his 15% kick-back arrangement from his clients; as a result his clients lost the opportunity to negotiate with Drury on fair terms regarding the conditions and fee arrangements of their employment of him; the opportunity to bargain with the full knowledge of all proper material information constitutes a valuable intangible interest of which Drury deprived his clients; the clients also lost the right to retain an attorney who was not engaged in ethical violations; Drury allowed his financial interest in

Dr. Macaluso to affect the professional services rendered to his clients; and the concealment of the 15% arrangement was not innocent but done with specific intent to defraud the clients of these intangible rights and opportunities.

The applicable disciplinary rule provides:

DR 5-107 Avoiding Influence by Others Than the Client

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.

One of the ethical considerations which precedes the rules in Canon 5 aids in our under-

standing of this rule; EC5-21 reads:

> The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

DR 5-107 is violated if an attorney, relative to his performance of legal services, accepts compensation or anything of value from someone other than his client without apprising the client of the situation and gaining the client's consent after the client fully understands the implications

of representation and the advantages and risks involved. The underlying purpose of the rule is to avoid a conflict of interest and, inter alia, a situation in which some outside economic interest might adversely affect the representation of a client. See M. Pirsig & K. Kirwin, Professional Responsibility, p. 425 et seq. (3d ed. 1977). Whereas, a potential conflict does not per se preclude representation, an undisclosed conflict is impermissible and violative of the Code even if no conflict actually arises. An analogous type of conflict is addressed by the Comment, "Lawyers Interests," to Rule 1.7 of the proposed Model Rules of Professional Conduct of the American Bar Association Commission of Evaluation of Professional Standards, commonly referred to as the Kutak Committee:

> . . .A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Applying these precepts to the evidence adduced before the commissioner and the committee on professional reponsibility we conclude that Drury committed multiple continuous violations of DR 5-107. We find that the retentions by Drury were referral fees not repayments of a debt. The debt supposedly owed was never given a fixed amount or specific amortization period. The arrangement continued for over five years and terminated only upon the indictments. The federal district court found that the 15% withholdings were fees not payments of debts; we agree with that conclusion. Accordingly, Drury had a substantial interest in the doctor's medical fees which might tempt him to

overlook overcharges, excessive treatment or poor medicine, should any occur. He clearly was not insulated from the desires of others or pressures that might influence his free professional judgment. The primary object of DR 5-107 is to prevent an attorney from becoming involved in conflicts of interests which may lead to the harm of his clients, the bar or the public. The harm does not have to occur in order for a prohibited conflict to exist.

The purpose of lawyer discipline proceedings is to maintain appropriate standards of professional conduct in order to protect the public and the administration of justice from lawyers who have demonstrated an unwillingness or inability to discharge their professional duties. LSBA v. O'Halloran,

412 So.2d 523 (La. 1981); LSBA v. Levy, 400 So.2d 1355 (La. 1981); LSBA v. Quaid, 368 So.2d 1043 (La. 1979). The discipline to be imposed in a particular case depends upon the seriousness of the offense, fashioned in light of the purpose of lawyer discipline, taking into account aggravating and mitigating circumstances. LSBA v. O'Halloran, supra; LSBA v. Levy, supra; LSBA v. Bensabat, 378 So.2d 38 (La. 1979); see ABA Joint Committee on Professional Discipline, Standards for Lawyers Disciplinary and Disability Proceedings, P 7.1, p.113 (1979).

Drury's long-standing, ingrained arrangement with the doctor easily could have lent itself to defrauding insurers and bilking clients. Conse-

quently, we consider these disciplinary violations to be very serious. On the other hand, because no actual deprivation of money or property was proved, the ultimate sanction of disbarment is not appropriate. Considering these mitigating and aggravating circumstances, and the precepts applicable to this case, a substantial period of suspension must be imposed.

It is ordered, adjudged and decreed that Edward R. Drury, respondent, shall have his license to practice in the State of Louisiana suspended for a period of three years, with credit for time elapsed during his present suspension, and that all costs of these proceedings be paid by respondent.

SUPREME COURT OF LOUISIANA

NO. 82-B-2143

LOUISIANA STATE BAR ASSOCIATION

versus

EDWARD R. DRURY

LEMMON, Justice, Concurring

Although I have serious doubts about the propriety of a criminal conviction based on a violation of the Code of Professional Responsibility by use of the mails, I have no doubt that respondent violated DR 5-107. Since this disciplinary matter essentially turns on proof of the violation of the disciplinary rule, and not solely on proof of the conviction, I concur in the decision.

APPENDIX "F"

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

FOR IMMEDIATE NEW RELEASE
NEWS RELEASE # 111

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 4th day of October, 1984, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARING DENIED:

82-B-2143 Louisiana State Bar Association
v. Edward R. Drury

APPENDIX "G"

ARTICLES OF INCORPORATION OF THE LOUISIANA STATE BAR ASSOCIATION

ARTICLE XV SECTION 8
Conviction of a Crime

The following rules shall be applicable when a respondent has been convicted of a crime, to-wit:

(1) Upon learning that an attorney has been convicted of a crime, whether the conviction results from a plea of guilty or nolo contendere or a verdict after trial, the Committee on Professional Responsibility may secure a certificate of such conviction from the applicable Clerk of Court

If the conviction is obtained in a Court of another state or a Federal Court, the Committee upon learning of the conviction, shall obtain two (2) copies of a certificate of conviction from the proper Court, and shall retain one (1) copy and may forward the other copy to the Supreme Court.

(2) The Committee shall then make a determination whether or not the crime of which the attorney has been convicted constitutes a serious crime. The term "serious crime" means a felony or any other

crime, the necessary element of which as determined by the statute defining such crime, reflects upon the attorney's moral fitness to practice law.

It will be necessary for the Committee in determining whether or not the crime constitutes a "serious crime", to study the statute defining the crime, particularly if the crime involves the violation of a statute of the Federal Government or another State or jurisdiction.

(3) Upon completing its determination as to whether or not the crime constitutes a "serious crime", the Committee shall file a written report with the Supreme Court, setting forth its findings and conclusions.

(4) If the Supreme Court should concur with the opinion of the Committee that the crime of which the attorney has been convicted constitutes a serious crime the Supreme Court may suspend the respondent from the practice of law and order the Committee to institute the necessary disciplinary proceedings so instituted will not, unless requested by the accused, be brought to a hearing until all appeals from the conviction are concluded.

(5) If the Committee in its report to the Supreme Court has concluded that the crime of which the attorney has been convicted is not a serious crime, or if the Supreme Court should determine independently that the crime is not a serious crime, the Supreme Court will refer the matter back to the Committee.

(6) An attorney will be reinstated immediately on the reversal of his conviction for a serious crime that has resulted in his suspension, but the reinstatement will not terminate any disciplinary proceedings then pending against the attorney.

(7) After the conviction has become final, that is, all appeals have been concluded or exhausted, the procedure shall be as follows:

(a) The Committee will file a petition in the Supreme Court seeking the disbarment or any other remedy that the Committee deems appropriate, and the petition will be served upon the respondent in the same manner as in ordinary proceedings.

(b) When issue is joined by answer by the respondent, a Commissioner will be appointed by the Supreme Court to represent the Court in the same manner as in ordinary proceedings.

(c) At the hearing before the Commissioner, the certificate of the conviction of the respondent shall be conclusive evidence of his guilt of the crime for which he has been convicted.

(d) At the hearing based upon a respondent's conviction of a crime, the sole issue to be determined shall be whether the crime warrants discipline, and if so, the extent thereof. At the hearing the respondent may offer evidence only of mitigating circumstances not inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime.

(8) Except as provided hereinabove in this Section, the procedure with reference to proceedings based on a conviction of a crime, shall be conducted in the same manner as in ordinary proceedings.

APPENDIX "H"

SUPREME COURT OF LOUISIANA

NUMBER 82-B-2143

LOUISIANA STATE BAR ASSOCIATION
Petitioner

VERSUS

EDWARD R. DRURY
Respondent

FILED _____ _____
CLERK

PETITION FOR DISCIPLINARY ACTION

TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES
OF THE SUPREME COURT OF LOUISIANA:

The Petition of the Louisiana State Bar Association, appearing herein through the Committee on Professional Responsibility, appearing through its Assistant Counsel, Richard A. Deas, respectfully represents:

I.

That Edward R. Drury, a member of the Louisiana State Bar Association, was, on November 24, 1981, after trial, convicted and found guilty by the United States District Court, Eastern District of Louisiana of 21 counts of Title 18 USC, Section 1341, mail fraud, all as set out in true copies of the Indictment, Judgment and Commitment Order and Docket Master attached to the Report of the Committee on Professional Responsibility and filed under Docket number 82-B-2143, made a part hereof by reference.

II.

That on September 2, 1982, this court did, by Order, suspend from the practice of law Edward R. Drury and did further order Petitioner to institute disciplinary proceedings against Edward R. Drury.

III.

That, therefore, Petitioner, under Article XV, Section 8, of the Articles of Incorporation of the Louisiana State Bar Association, states that Edward R. Drury has been convicted of serious offenses, felonies, and ones that indicate that he lacks the moral fitness to practice law.

IV.

That in keeping with the provisions of Section 8, Paragraph 7 (a) through (d) of the Article XV of the Articles of Incorporation of the Louisiana State Bar Association, the Committee files this Petition for appropriate disciplinary action by this Court.

WHEREFORE, Petitioner prays:

1. That Respondent be ordered to plead or answer within fifteen (15) days

from the date of service upon him of a copy of this Petition; and

2. That after issue is joined and the conviction of Respondent be final or the Respondent has requested that these proceedings be brought to a hearing, the Court appoint a Commissioner to take evidence and, in due course, report to this Honorable Court his findings of fact and conclusions of law, and

3. That ultimately the Respondent, Edward R. Drury, be disbarred from the practice of law; that his name be stricken from the Roll of Attorneys, and his license to practice law in the State of Louisiana be cancelled, or

4. That the Respondent be suspended from the practice of law in the State of Louisiana for a period deemed appropriate by this Court, or

5. That Respondent receive whatever lesser disciplinary action allowed by law and deemed appropriate by this Court, and

6. That if this Court's decision is adverse to Respondent, he be ordered to pay all costs of these proceedings.

LOUISIANA STATE BAR
ASSOCIATION, COMMITTEE
ON PROFESSIONAL RESPONSIBILITY

Roland J. Achee, Chairman

Robert J. Boudreau

Wood Brown, III

Sam J. D'Amico

Carrick R. Inabnett

Harold J. Lamy

Alfred S. Landry

Philippi P. St. Pee'

Gerard F. Thomas

C E R T I F I C A T E

I, the undersigned counsel for the Petitioner and the Committee on Professional Responsibility, certify that a copy of the foregoing Petition has been mailed to Respondent, Edward R. Drury, and his counsel, Clark A. Richard, by United States Mail, postage prepaid this 15th day of March, 1983.

RICHARD A. DEAS,
ASSISTANT COUNSEL

APPENDIX "I"

SUPREME COURT OF LOUISIANA

NUMBER 82-B-2143

LOUISIANA STATE BAR ASSOCIATION
Petitioner

versus

EDWARD R. DRURY
Respondent

FILED_____ _____
CLERK

A N S W E R

NOW comes Edward R. Drury, respondent, and for answer to the petition of the Committee on Professional Responsibility, says:

I.

Denied.

II.

Admitted.

III.

Denied.

IV.

Denied.

WHEREFORE, respondent prays that this answer be deemed sufficient, that these proceedings be brought to a hearing, that the Court appoint a commissioner to take evidence and in due course report his findings and conclusions, and that after due proceedings had, this matter be dismissed.

CLARK A. RICHARD
ATTORNEY FOR RESPONDENT
904 NORTH BROAD AVENUE
NEW ORLEANS, LOUISIANA
(70119) 821-0442

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid on this 22 day of March, 1983